IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF IDAHO

IN RE	)	
	)	**Case No. 99-02609**
DANNY TORRES and CAREN TORRES,	)	
	)	**SUMMARY ORDER**
Debtors.	)	
_____	)	

Background

Before the Court is a motion by Debtors Danny and Caren Torres ("Debtors") to rescind an order confirming their Chapter 13 plan, or in the alternative, to require the Chapter 13 Trustee Bernie R. Rakozy ("Trustee") to return funds already paid to Trustee that he has not yet distributed to creditors. (Docket No. 20). Trustee objected to this motion. (Docket No. 23). The motion was originally submitted on an ex parte basis, however, the Court determined a hearing was necessary, and one was held on September 26, 2000. Trustee was asked to submit a letter to the Court outlining his proposal for distribution of the funds to creditors (Docket No. 28), to which Debtors responded. (Docket No. 27). This matter was then taken under advisement.

Facts

Debtors filed their Chapter 13 petition way back in October 1999. A confirmation hearing was held on their proposed plan on January 4, 2000. At the hearing, the Court ordered the plan be confirmed. Counsel for Debtors was directed to promptly submit an appropriate order of confirmation to the Court after allowing Trustee to approve it.

Debtors' plan did not indicate that any amounts would be paid for any mortgage arrearage to the holder of the first mortgage on their home. However, the mortgage creditor filed a proof of claim indicating an arrearage existed. Because Debtors' counsel and Trustee could not agree on the amount of the arrearage to be paid under the plan to the first mortgage holder, no order of confirmation was submitted by counsel to Trustee for approximately eight months. After several conversations between staff persons for Trustee and Debtors' counsel over this time, Debtors agreed to pay an amount for the arrearage through the plan, and a proposed confirmation order was finally submitted to the Court.

In the meantime, however, Debtors themselves had worked out an arrangement with their first mortgage holder allowing them to cure the arrearage by adding it to the end of the loan, at lower interest rates, and lower monthly

payments than originally thought necessary. This was such a good result that Debtors decided they no longer needed the protections of Chapter 13. When Debtors' counsel and Debtors finally spoke in August, and counsel learned of the arrangement made with mortgage creditor, he called the deputy clerk assigned to the case on August 23 and left a message indicating Debtors were going to dismiss their case, and instructing the clerk to remove the proposed order from the judge's "signing table." This particular deputy clerk was on vacation that week, and apparently no one else retrieved her phone messages in her absence.[1] Debtors' counsel, wanting to double-check that the proposed order would not be signed, had his staff person contact another member of the Clerk's staff on August 28, who indicated the confirmation order would be retrieved from chambers, and not signed. Assuming this would occur, Debtors' counsel filed a motion to dismiss the bankruptcy case on the evening of August 28. However, the confirmation order, that morning had been signed by the bankruptcy judge.

Debtors now ask that the order of confirmation be rescinded or in the alternative, that Trustee be required to return the $2,700 which they had

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[1] Such is obviously an unacceptable practice. The Court has been assured by the Clerk that changes in internal procedure have been implemented to prevent this sort of deficiency from reoccurring.

already paid into the plan. Trustee resists and asks to be allowed to distribute the funds to creditors in accordance with the confirmed Chapter 13 plan.

Disposition

A Chapter 13 debtor has the absolute right to convert or dismiss his or her case at any time. 11 U.S.C. §§ 1307(a),(b). Ordinarily, upon dismissal, all property of the bankruptcy estate revests in its previous owner. Section 349(b) provides:

> *Unless the court, for cause, orders otherwise*, a dismissal of a case other than under section 742 of this title . . . (3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

11 U.S.C. § 349(b)(3). Here, Debtors want the funds paid in over the months to the Trustee returned to them. Trustee urges that he be allowed to distribute the money to the creditors as set forth in the plan. To resolve the issues raised by Debtors' motion, then, this Court must determine whether cause exists for purposes of Section 349 to justify departing from the usual course of events, in this case, return of the funds from the Trustee to Debtors.

Debtors assert their plan was confirmed only after they had "withdrawn their consent to submit the Order for signing . . . " Affidavit of

Stephen W. French. While this is true, and probably constitutes a sufficient basis to set aside the order confirming the plan, such does not alone resolve the issue of what happens to those funds paid to the Trustee over eight months.

After the confirmation hearing on January 4, 2000, Debtors' counsel was given the responsibility of preparing and submitting a proposed confirmation order to the Court, subject to Trustee's approval. The order was not submitted for approximately eight months due to a disagreement between counsel and the Trustee's office regarding an arrearage for the first mortgage holder, together with counsel's conceded lack of diligence in following up with his clients and the mortgage company. Despite being contacted by Trustee's office staff several times, Debtors' counsel indicated the case became "buried" at his office, and no resolution of the terms of the confirmation order was achieved until August. Meanwhile, Debtors' creditors were held at bay, and without receiving any payments, for over ten months. It hardly seems appropriate those creditors should receive nothing on account of the delay, during which time they could take no action to otherwise assert or protect their rights.

The facts in the instant case are analogous to situations which have arisen in Chapter 12 cases in this District. In one such case, the Court commented:

> In most Chapter 12 plans, payments are made on an annual basis. Creditors are held off throughout the growing season. It would be unfair to allow the debtor to voluntarily remit the proceeds from the crops to the trustee and then deny the creditors the distribution of those funds pursuant to a confirmed plan by simply dismissing their case.

In re Willett, 92 I.B.C.R. 200, 202 (Bankr. D. Idaho 1992). *See also In re Van Orden,* 94 I.B.C.R. 3, 4 (Bankr. D. Idaho 1994) ("there may be circumstances existing at the time of dismissal which, when presented to the Court by an interested party, may persuade the Court to exercise its discretion and to direct that the funds be paid over to a party other than the [ ] debtor").[2]

At hearing, counsel argued that Debtors in no way tried to manipulate the bankruptcy system, and had fully intended to have their plan promptly confirmed and their creditors paid. Trustee also agreed the plan should be confirmed at the January confirmation hearing. Moreover, it was

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[2] This Court has previously noted that while there is Ninth Circuit authority for the proposition that funds held by the Trustee must be returned to the debtor upon dismissal, see *In re Nash*, 765 F.2d 1410 (9th Cir. 1985), that decision did not discuss the "unless the court, for cause, orders otherwise," language of Section 349(b)(3).

> There is no discussion of the Court's discretion to direct distribution under Section 349(b) in *Nash*. This suggests to the Court that the Ninth Circuit would allow consideration of the specific facts of this case in determining the proper distribution of funds upon dismissal of a Chapter 12 case.

In re Willett, 92 I.B.C.R. at 202.

certainly the Court's instruction that the plan be confirmed, and that an order effecting such be submitted straightaway. While the Court attributes no manipulative intent to the Debtors here, the results of the delay are the same as those in cases where mischief is at work: Debtors received protection through the Bankruptcy Code for some ten months while their creditors received nothing. Under these circumstances, the interests of the creditors are at risk.

Debtors' counsel also candidly admitted at hearing that if he had timely met with his clients and contacted the mortgage company sooner, as he should have, the plan would have been confirmed shortly after the confirmation hearing, and certainly long before it was. Given this confession, it is difficult to understand how Debtors can now complain that what they had intended to occur (i.e., confirmation of their plan and distribution of the funds by Trustee to their creditors), and what finally did occur; now represents an improper outcome to the case.

Debtors are chargeable for the consequences of the delay here. Clients are held responsible for their attorney's errors. *Pioneer Investment Services Co. v. Brunswick Assoc. Limited Partnership*, 507 U.S. 380, 396 (1993); *Jones Stevedoring Co. v. Director, Office of Workers Compensation Programs*, 133 F.3d 683, 689 (9th Cir. 1997). Debtors' counsel suggests the fault for the

order being signed rests with the Clerk. He is correct, as far as the point goes. However, had counsel diligently proceeded with submission of a confirmation order, this unfortunate situation would not have occurred. If Debtors' motion is granted, Debtors will have enjoyed use of the Trustee's office as something akin to a court-protected savings account during the pendency of their case. Under these odd circumstances, the rights of creditors should be paramount.

Because good "cause" exists for the court to order otherwise, the funds paid into the plan and held by Trustee should not revest in Debtors as would normally occur pursuant to Section 349(b)(3) upon dismissal of the Chapter 13 case. Debtors' Motion to Rescind Confirmation or in the Alternative Motion for Turnover of Funds on Hand (Docket No. 20) is hereby **DENIED** and Trustee is hereby authorized to disburse the $2,700 held on Debtors' account as proposed in his letter to the Court

IT IS SO ORDERED.

DATED This _____ day of October, 2000.

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JIM D. PAPPAS
CHIEF U.S. BANKRUPTCY JUDGE

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I mailed a true copy of the document to which this certificate is attached, to the following named person(s) at the following address(es), on the date shown below:

Office of the U.S. Trustee
P. O. Box 110
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Stephen W. French, Esq.
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Bernie Rakozy
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CASE NO.: 99-02609

CAMERON S. BURKE, CLERK
U.S. BANKRUPTCY COURT

DATED:

By_____
Deputy Clerk